Petition

Office-Supreme Court, U.S.
FILED
JUL 18 1981
ALEXANDER L. STEVAS,
CLERK

NO. 81-180

IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

TOMMY REID, JR.,
Petitioner,

v.

STATE OF GEORGIA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE GEORGIA COURT OF APPEALS

DENNIS S. MACKIN
STROTHER, WEINER & DWYER
1401 West Paces Ferry Rd.
Atlanta, Georgia 30327
404-233-7177
Attorney for Petitioner

QUESTION PRESENTED

1.

Did the Supreme Court of the United States on June 30, 1980 create the law of the case in regard to the issue of seizure in this case?

INDEX

TABLE OF CONTENTS

	Page
Opinion Below	1
Jurisdiction	2
Question Presented	2
Constitutional and Statutory Provisions Involved	2
Statement	2
Reasons for Granting the Writ:	
1. The Decision of the United States Supreme Court has created the law of the case contrary to the decisions of the Court of Appeals of the State of Georgia	3
Conclusion	4
Certificate of Service	5

INDEX Continued

TABLE OF AUTHORITIES

Page

Constitution

U.S. Const. Amend. IV 2

Case

Insurance Group v. D.& R.G.W.R. Co., 329 U.S. 607, 91 L.Ed. 547, 67 S.C. 583 (1947) 4

Tommy Reid, Jr. v. State of Georgia, United States Supreme Court (No. 79-448 decided June 30, 1980) ___ U.S. ___, 65 L.Ed.2d 890, 100 S.Ct. ___ 3

Stewart v. Salamon, 97 U.S. 361, 24 L.Ed. 1044 4

Other

5 AmJur 2d *Appeal and Error* §744 (1980) 4

INDEX TO APPENDICES

APPENDIX A 1a

APPENDIX B 1b

APPENDIX C 1c

APPENDIX D 1d

NO.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

TOMMY REID, JR.,

Petitioner,

v.

STATE OF GEORGIA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE GEORGIA COURT OF APPEALS

The Petitioner respectfully prays that a Writ of Certiorari be issued to review the opinion and judgment of the Georgia Court of Appeals entered in the above case on May 19, 1980.

THE OPINION BELOW

The opinion of the Georgia Court of Appeals and the opinion of the United States Supreme Court and the Georgia Supreme Court in regard to this case are attached hereto. The opinion of the United States Supreme Court in this case is attached as Appendix A; the opinion of the Georgia Court of Appeals is attached as Appendix B and the opinion of the Georgia Supreme Court in this case is attached as Appendix C.

JURISDICTION

The judgment of the Georgia Court of Appeals of this was entered on May 19, 1979. The decision of the Georgia Supreme Court was rendered on April 9, 1981. The opinion of the United States Supreme Court in this case was rendered June 30, 1980. The Court's jurisdiction is invoked under Title 28, United States Code Section 1257(3).

QUESTION PRESENTED

1.

Did the Supreme Court of the United States on June 30, 1980 create the law of the case in regard to the issue of seizure in this case?

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The pertinent provisions to the Fourth Amendment to the United States Constitution are set forth in Appendix D hereto.

STATEMENT

On June 30, 1980, this Supreme Court of the United States rendered a decision which stated in part that judgment of the Court of Appeals of Georgia was vacated and the case remanded to that Court for further proceedings not inconsistent with this opinion.

That opinion stated that the fact situation before the Court as a basis for the seizure of the Petitioner in this case was "too slender a reed to support the seizure in this case."

Based on this remand, the Georgia Court of Appeals entered a decision sustaining the original Order of the trial court, which had sustained the Defendant's Motion to Suppress, that decision of the Georgia Court of Appeals was rendered October 10, 1980, and stated that this judgment was vacated in accordance with the decision of the United States Supreme Court, being No. 79-448, decided June 30, 1980. ___ U.S. ___ 65 L.Ed.2d 890, 100 S.Ct. ___.

Subsequently, the District Attorney of the Atlanta Judicial Circuit filed a Petition for Certiorari to the Georgia Supreme Court, which was granted November 18, 1980. On April 9, 1981, the Supreme Court issued a decision of the case to the Court of Appeals of Georgia for further proceedings, holding that

> "We find that during this initial encounter there was no seizure."

Based on this remand, the Court of Appeals of Georgia, on May 19, 1981, reversed its prior decision and substituted the decision of the Supreme Court of Georgia reversing the trial court judgment which had sustained a Motion to Suppress.

REASONS FOR GRANTING THE WRIT

1.

THE DECISION OF THE UNITED STATES SUPREME COURT HAS CREATED THE LAW OF THE CASE CONTRARY TO THE DECISION OF THE COURT OF APPEALS OF THE STATE OF GEORGIA.

The per curiam opinion rendered by the United States Supreme Court previously in this case is "the law of the

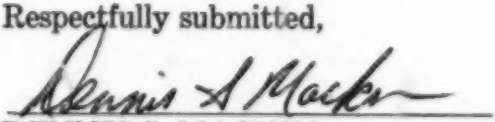
case" in regard to the issue of seizure. The decision of the Court of Appeals of Georgia to the extent that it conflicts with this decision is invalid and unenforceable.

5 AmJur 2d *Appeal and Error* §744, *Insurance Group v. D. & R.G.W.R. Co.*, 329 U.S. 607, 91 L.Ed. 547, 67 S.C. 583 (1947); see also *Stewart v. Salamon*, 97 U.S. 361, 24 L.Ed. 1044.

CONCLUSION

Since the holding of this United States Supreme Court has previously determined the issue of seizure in this case, the Georgia Court of Appeals is without jurisdiction under that mandate of the U.S. Supreme Court to determine that a seizure has not occurred. For the decision of the Georgia Court of Appeals to the extent that it conforms with the decision of the Georgia Supreme Court is contrary to the mandate of this United States Supreme Court and should be reversed.

Respectfully submitted,



DENNIS S. MACKIN
Attorney for Petitioner

STROTHER, WEINER & DWYER
Suite D-116
1401 West Paces Ferry Road, N.W.
Atlanta, Georgia 30327
(404) 233-7177

CERTIFICATE OF SERVICE

I hereby certify that I have made service in the foregoing Petition for a Writ of Certiorari to the Supreme Court of the United States of America by depositing a copy of same in the United States Mail with sufficient postage affixed thereto, addressed to each of the following:

MR. ARTHUR BOLTON
Attorney General, State of Georgia
132 State Judicial Building
Atlanta, Georgia 30334

MR. ALTON HAWK
Clerk, Court of Appeals, State of Georgia
433 State Judicial Building
Atlanta, Georgia 30334

MR. LEWIS R. SLATON
District Attorney, Fulton County
Third Floor
Fulton County Courthouse
136 Pryor Street, S.W.
Atlanta, Georgia 30303

The 17 day of July, 1981.

Dennis S. Mackin

DENNIS S. MACKIN
Attorney for Petitioner

APPENDICES

APPENDIX A

SUPREME COURT OF THE UNITED STATES

TOMMY REID, JR. *v.* STATE OF GEORGIA

On Petition for Writ of Certiorari to the

Court of Appeals of Georgia

No. 79-448. Decided June 30, 1980

PER CURIAM.

The petitioner was indicted in the Superior Court of Fulton County, Ga., for possessing cocaine. At a hearing before trial, he moved to suppress the introduction of the cocaine as evidence against him on the ground that it had been seized from him by an agent of the federal Drug Enforcement Administration (DEA) in violation of his rights under the Fourth and Fourteenth Amendments.

The relevant facts were determined at the pretrial hearing and may be recounted briefly. The petitioner arrived at the Atlanta Airport on a commercial airline flight from Fort Lauderdale, Fla., in the early morning hours of August 14, 1978. The passengers left the plane in a single file and proceeded through the concourse. The petitioner was observed by an agent of the DEA, who was in the airport for the purpose of uncovering illicit commerce in narcotics. Separated from the petitioner by several persons was another man, who carried a shoulder bag like the one the petitioner carried. As they proceeded through the concourse past the baggage claim area, the petitioner occasionally looked backward in the direction of the second man. When they reached the main lobby of the terminal, the second man caught up with the petitioner and spoke briefly with him. They then left the terminal building together.

The DEA agent approached them outside of the building, identified himself as a federal narcotics agent, and asked them to show him their airline ticket stubs and identification, which they did. The airline tickets had been purchased with the petitioner's credit card and indicated that the men had stayed in Fort Lauderdale only one day. According to the agent's testimony, the men appeared nervous during the encounter. The agent then asked them if they would agree to return to the terminal and to consent to a search of their persons and their shoulder bags. The agent testified that the petitioner nodded his head affirmatively, and that the other responded, "Yeah, okay." As the three of them entered the terminal, however, the petitioner began to run and before he was apprehended, abandoned his shoulder bag. The bag, when recovered, was found to contain cocaine.

The Superior Court granted the petitioner's motion to suppress the cocaine, concluding that it had been obtained as a result of a seizure of him by the DEA agent without an articulable suspicion that he was unlawfully carrying narcotics. The Georgia Court of Appeals reversed. It held that the stop of the petitioner was permissible, citing *Terry v. Ohio*, 392 U.S. 1, since the petitioner, "in a number of respects, fit a 'profile' of drug couriers compiled by the [DEA]." [1] The appellate court also concluded that the petitioner had consented to return to the terminal for a search of his person, and that after he had attempted to flee and had discarded his shoulder bag, there existed probable cause for the search of the bag.

The Fourth and Fourteenth Amendments' prohibition of searches and seizures that are not supported by some

---

[1] The decision of the Georgia Court of Appeals has not been reported.

objective justification governs all seizures of the person, 'including seizures that involve only a brief detention short of traditional arrest. *Davis v. Mississipi*, 394 U.S. 721 (1969); *Terry v. Ohio*, 392 U.S. 1, 16-19 (1968)." *United States v. Brignoni-Ponce*, 422 U.S. 873, 878.[2] While the Court has recognized that in some circumstances a person may be detained briefly, without probable cause to arrest him, any curtailment of a person's liberty by the police must be supported at least by a reasonable and articulable suspicion that the person seized is engaged in criminal activity. See *Brown v. Texas*, 443 U.S. 47, 51; *Delaware v. Prouse*, 440 U.S. 648, 661; *United States v. Brignoni-Ponce, supra*; *Adams v. Williams*, 407 U.S. 143, 146-149; *Terry v. Ohio, supra*.

The appellate court's conclusion in this case that the DEA agent reasonably suspected the petitioner of wrongdoing rested on the fact that the petitioner appeared to the agent to fit the so-called "drugs courier profile," a somewhat informal compilation of characteristics believed to be typical of persons unlawfully carrying narcotics. Specifically, the court thought it relevant that (1) the petitioner had arrived from Fort Lauderdale, which the agent testified is a principal place of origin of cocaine sold elsewhere in the country, (2) the petitioner arrived in the early morning, when law enforcement activity is diminished, (3) he and his companion appeared to the agent to be trying to conceal the fact that they were traveling together, and (4) they apparently had no luggage other than their shoulder bags.

[2] "Obviously, not all personal intercourse between policemen and citizens involves 'seizures' of persons. Only when the officer, by means of physical force or show of authority, has in some way restrained the liberty of a citizen may we conclude that a seizure has occurred." *Terry v. Ohio*, 392 U.S. 1, 19, n. 16. See also *id.*, at 34 (WHITE, J., concurring); *id.*, at 31, 32-33 (HARLAN, J., concurring).

We conclude that the agent could not, as a matter of law, have reasonably suspected the petitioner of criminal activity on the basis of these observed circumstances. Of the evidence relied on, only the fact that the petitioner preceded another person and occasionally looked backward at him as they proceeded through the concourse relates to their particular conduct. The other circumstances describe a very large category of presumably innocent travellers, who would be subject to virtually random seizures were the Court to conclude that as little foundation as there was in this case could justify a seizure. Nor can we agree, on this record, that the manner in which the petitioner and his companion walked through the airport reasonably could have led the agent to suspect them of wrongdoing. Although there could, of course, be circumstances in which wholly lawful conduct might justify the suspicion that criminal activity was afoot, see *Terry v. Ohio*, *supra*, at 27-28, this not such a case. The agent's belief that the petitioner and his companion were attempting to conceal the fact that they were traveling together, a belief that was more an "inchoate and unparticularized suspicion or 'hunch,' " *id.*, at 27, than a fair inference in the light of his experience, is simply too slender a reed to support the seizure in this case.

For these reasons, the judgment of the appellate court cannot be sustained insofar as it rests on the determination that the DEA agent lawfully seized the petitioner when he approached him outside the airline terminal. Accordingly, the judgment of the Georgia Court of Appeals is vacated and the case is remanded to that court for further proceedings not inconsistent with this opinion.

It is so ordered.

MR. JUSTICE REHNQUIST dissents for the reasons stated by MR. JUSTICE STEWART in his opinion in *United States v. Mendenhall*, ____ U.S. ____. He believes that the police conduct involved did not implicate the Fourteenth or Fourth Amendment rights of the petitioners.

SUPREME COURT OF THE UNITED STATES

TOMMY REID, JR. *v.* STATE OF GEORGIA

On Petition for Writ of Certiorari to the Court of Appeals of Georgia

No. 79-448. Decided June 30, 1980

MR. JUSTICE POWELL, with whom THE CHIEF JUSTICE and MR. JUSTICE BLACKMUN join, concurring.[1]

This case is similar in many respects to *United States v. Mendenhall*, ____ U.S. ____ (May 27, 1980), in which a defendant observed walking through an airport was stopped by DEA agents and asked for identification. The threshold question in *Mendenhall*, as here, was whether the agent's initial stop of the suspect constituted a seizure within the meaning of the Fourth Amendment. MR. JUSTICE STEWART, joined by MR. JUSTICE REHNQUIST, was of the opinion that the mere stopping of a person for identification purposes is not a seizure:

> " We conclude that a person has been 'seized' within the meaning of the Fourth Amendment only if, in view of all of the circumstances surrounding the incident, a reasonable person would have believed that he was not free to leave." Slip op., at 9.[2]

Thus, on the basis of facts remarkably similar to those in the present case, MR. JUSTICE STEWART and MR. JUSTICE REHNQUIST decided that no seizure had occurred.

---

[1] I agree, on the basis of the fragmentary facts apparently relied upon by the DEA agents in this case, that there was no justification for a "seizure."

[2] MR. JUSTICE STEWART also noted that " '[t]here is nothing in the Constitution which prevents a policeman from addressing questions to anyone on the streets.' " *Id.*, at 7, quoting *Terry v. Ohio*, 392 U.S., at 34 (WHITE, J., concurring). See also *ante*, at n. 2.

My concurring opinion in *Mendenhall*, joined by THE CHIEF JUSTICE and MR. JUSTICE BLACKMUN, did not consider the seizure issue because it had not been raised in the courts below. Even if the stop constituted a seizure, it was my view that the DEA agents had articulable and reasonable grounds for believing that the individual was engaged in criminal activity. Therefore, they did not violate the Fourth Amendment by stopping that person for routine questioning. I expressly stated, however, that my decision not to reach the seizure issue did not necessarily indicate disagreement with the views of MR. JUSTICE STEWART and MR. JUSTICE REHNQUIST. Slip op., at ____, n. 1.[3]

The state courts, which decided this case before our decision in *Mendenhall*, did not consider whether the petitioner had been seized. Rather, those courts apparently assumed that the stop for routine identification questioning constituted a seizure, and addressed only the question whether the agent's actions were justified by articulable and reasonable grounds of suspicion. Because we similarly do not consider the initial seizure question in our decision today, that issue remains open for consideration by the state courts in light of the opinions in *Mendenhall*.

---

[3] MR. JUSTICE WHITE, joined by MR. JUSTICE BRENNAN, MR. JUSTICE MARSHALL, and MR. JUSTICE STEVENS, filed a dissenting opinion in *Mendenhall* in which they concluded that the respondent had been detained in violation of the Fourth Amendment.

APPENDIX B

CASE No. 57466

COURT OF APPEALS OF GEORGIA

MAY 19, 1981

RECEIVED MAY 20, 1981

57466. The State v. Tommy Reid, Jr.

It appearing that the judgment of this Court of October 10, 1980 has been reversed and remanded on certiorari;

It is ordered that the said judgment be hereby vacated.

MAY 19, 1981

57466. STATE V. REID. Ba-57.

BANKE, Judge.

The decision of this court in the above-styled case [*State v. Reid*, 156 Ga. App. 78 (274 SE2d 164) (1980)] having been reversed by the Supreme Court on certiorari (*State v. Reid*, ____ Ga. ____) (1981) (Case No. 36953, decided April 9, 1981), our decision is hereby vacated. The decision of the Supreme Court is substituted, and the trial court's judgment is reversed.

Judgment reversed. McMurray, P. J., and Pope, J., concur.

APPENDIX C

IN THE SUPREME COURT OF GEORGIA

Decided: April 9, 1981

36953. STATE v. TOMMY REID, JR.

HILL, Presiding Justice.

On the morning of August 14, 1978, an agent of the U. S. Department of Justice, Drug Enforcement Administration, stood at Gates 41 and 42 at the Atlanta International Airport watching passengers disembark from a commercial flight from Fort Lauderdale, Florida, at about 5 a.m. The agent held a bachelor of science degree in criminology and law enforcement from FSU and had been with DEA (or its predecessor agency) approximately six years—four years as an investigator and two as an agent. He routinely watched flights from south Florida (Miami and Fort Lauderdale) because large amounts of heroin coming into the United States are distributed from there. Although he was familiar with the so-called drug courier profile, he did not follow it to the letter. Rather he looked for some characteristics that are included in the profile as well as others that are not, and he let his own experience be his major guide.

According to the agent, 50 to 75 people disembarked from the flight, including the defendant, Tommy Reid, Jr. Reid was carrying a "rather large, light colored, man's purse"; another man (Claude Williams) with a nearly identical purse disembarked eight to ten people behind Reid. Neither Reid nor Williams asked for directions from the airline's flight attendant, indicating to the agent that they had no connecting flight to catch. The gates involved were on a level lower than the main concourse; as was his custom, the agent watched the disembarking passengers

walk up the steps. He noticed Reid kept glancing over his shoulder at Williams, who was 10 to 15 feet behind him. Surmising that Reid and Williams were travelling together but trying to conceal it, the agent became suspicious and followed them. From the top of the stairs they proceeded 75 to 100 yards to the center terminal security checkpoint. Williams stayed 10 to 15 feet behind Reid, and Reid turned to check Williams' position four or five times. Once they had passed through the exit beside the checkpoint, Williams caught up with Reid and spoke a few words to him. Both men then quickened their pace and "hurriedly walked" toward the front doors of the terminal, bypassing the escalators leading down to the baggage claim area.

Just as they left the terminal and were on the front sidewalk getting ready to cross the traffic lanes in front of the terminal, the agent approached them and said excuse me (or something similar) to attract their attention.[1] The agent was dressed in blue jeans and a lightweight jacket (a windbreaker); his gun was in the right rear area of his belt, stuck in his waistband, completely hidden by his jacket. Having gotten Reid and Williams' attention, the agent identified himself as a DEA agent and showed them

---

[1] The transcript of the hearing on the motion to suppress indicates that instead of simply saying excuse me, the agent also tapped one of the men on the shoulder to get their attention. During cross examination he was asked if he had testified at the preliminary hearing that he had tapped one of them on the shoulder. He stated that he did not recall having so testified but he did not deny having so testified. On redirect examination he was asked, "Did you have a weapon or grab these men?", and he answered, "No way did I touch them." Finally, during recross examination the defendant tendered a copy of the preliminary hearing transcript to show that on cross examination, when asked, "How did you go about stopping them"?, the agent answered, "I just tapped one of them on the shoulder." The state conceded that that statement was made.

his identification. The agent then asked Reid and Williams if they would show him their airline tickets, which they did. The tickets had both been paid for by a credit card in Reid's name; except that one was issued to T. Reid and one to C. Williams they were identical. They were round trip tickets, departing Atlanta and arriving in Ft. Lauderdale at about 2 a.m., August 13, and on return arriving in Atlanta at about 5 a.m., August 14. There were no baggage claim stubs on the tickets. The agent then asked Reid and Williams for identification; Reid produced a Visa card and Williams a Georgia driver's license. The agent observed that Reid appeared to be nervous as his fingers were trembling. The agent then asked if they would mind telling him what the purpose of their trip to Ft. Lauderdale was. Williams responded that they had gone to see friends.

The agent then testified: "At that time, I told both gentlemen that from drug information we were seeing awfully lot (sic) of drugs being carried through the airport. And I asked them if they would cooperate with me to eliminate suspicions that I have about them, about accompanying me back to the airport and allowing me to conduct a quick pat-down search of their person and to look in their purses." According to the agent, Williams answered "Yeah, okay" and Reid nodded in the affirmative. The agent then turned to walk back into the terminal, the front doors of which were 6 to 8 feet away or slightly further. Reid walked back into the terminal but Williams hesitated on the curb. The agent waited for Williams. Reid proceeded into the terminal, turned to the left, and began running. The agent gave chase after turning Williams over to a passing Atlanta police officer. Reid was caught in the parking lot; by then the agent was

holding his gun; Reid threw up his hands and stopped. The agent handcuffed Reid and took him to the Atlanta police airport office. Having returned to where he had left Williams in custody and asked that police officer to take him to the office, the agent them retraced Reid's steps and retrieved the purse which Reid had discarded from the foyer through which Reid had exited the airport. The purse was about 100 feet from where the agent apprehended Reid.

When the agent returned to the police office, the officer guarding Reid told him she had seen Reid drop something into a trash can. Reid was alone in a room; the trash can was 2 or 3 feet from where he sat.[2] Upon investigating, the agent found that the trash can had been recently emptied; the only item in the can, except for the plastic bag liner, was a small silver key. The agent used the key to open the purse; inside he found $1,036 in small bills, some change, and a Johnson Baby Powder container. He pried the top off the container and inside found a clear plastic bag in which was another clear plastic bag containing a white powder substance he tentatively identified as cocaine.

Reid was indicted for a violation of the Georgia Controlled Substances Act, to wit, possession of cocaine; subsequently his attorney filed a motion to suppress the evidence against him which was seized at the Atlanta Airport, on the ground that the evidence was seized as the result of an illegal arrest, and "the officer [could] show to articulable suspicion to justify the intrusion upon the rights of the defendant to be free from unreasonable searches and seizures." At the hearing at which the DEA

---

[2] The officer guarding Reid was in the next room, but had been observing him through the open door.

agent was the only witness, the trial court found that "at the time the officer suggested these men go back into the airport with him" they were under arrest, and that at that point the officer had no "articulable suspicion". The trial court therefore granted the motion to suppress.

On appeal, the Court of Appeals reversed, finding that the defendant and Williams fit the DEA drug courier profile in a number of respects and holding that the evidence was sufficient to establish "articulable suspicion" sufficient to justify a brief stop for questioning under Terry v. Ohio, 392 U. S. 1 (99 SC 1868, 20 LE2d 889) (1968); that the evidence that Reid voluntarily consented to return to the terminal was unrebutted and thus he was not under arrest prior to his flight; and that "Given a permissible 'Terry stop' and a freely given consent to return to the terminal for 'the pat-down and look in the purse,' there is ample authority for the proposition that flight in connection with the other circumstances would provide probable cause for the subsequent apprehension and search of the purse discarded in defendant's flight." *Reid v. State*, 149 Ga. App. 685, 687 (255 SE2d 71) (1979).

After this court denied certiorari, the United States Supreme Court granted certiorari, vacated the Court of Appeals opinion, and remanded the case to the Court of Appeals for further proceedings. Reid v. Georgia, 48 USLW 3847 (June 30, 1980). The U. S. Supreme Court held that the evidence did not, as a matter of law, show a basis for an articulable or reasonable suspicion sufficient to justify any seizure of Reid, even a "Terry stop." Thus the Court held that the Court of Appeals judgment "cannot be sustained insofar as it rests on the determination that the DEA agent lawfully *seized* the petitioner when he approached him outside the airline terminal." (Emphasis supplied.) Justice Rehnquist dissented for the reasons

stated by Justice Stewart in his opinion in U. S. v. Mendenhall, 446 U. S. 544, (100 SC 1870, 64 LE2d 497) (1980); Justice Powell, joined by Chief Justice Burger and Justice Blackmun, concurred, pointing out that the facts are remarkably similar to those in Mendenhall, supra, and that the issue of whether Reid was "seized" when he was stopped for routine questioning remained open for consideration.

On remand, the Court of Appeals affirmed the trial court's order sustaining the defendant's motion to suppress without comment as to the question of whether there was a seizure in this case as described in Mendenhall. *State v. Reid*, 156 Ga. App. 78 (SE2d) (1980). We granted certiorari to determine whether the Court of Appeals erred in affirming the trial court's granting of the motion to suppress. Compare *McShan v. State*, 155 Ga. App. 518 (271 SE2d 659) (1980).

The Fourth Amendment provides in pertinent part that "The right of the people to be secure in their persons . . . against unreasonable searches and seizures, shall not be violated. . . ." Yet " . . . not all personal intercourse between policemen and citizens involves 'seizures' of persons. Only when the officer, by means of physical force or show of authority, has in some way restrained the liberty of a citizen may we conclude that a 'seizure' has occurred." Terry v. Ohio, 392 U. S. 1, 19, fn. 16.[3]

The first question that must be resolved in this case is

---

[3] The fact that the defendant was walking (as opposed to being seated in the terminal) and his egress was interrupted by the agent appears to have no legal significance. Compare U. S. v. Berd, 634 F2d 979, 982 (5th Cir. 1981), with United States v. Berry, 636 F2d 1075, 1077 (5th Cir. 1981). The defendant in United States v. Mendenhall, supra, was walking when her progress was interrupted by the agent.

whether the DEA agent's approach to and interview with the defendant, in which he asked him for identification, to see his airline ticket, why he had been to Ft. Lauderdale, and whether he would return to the terminal and consent to be searched, constituted a seizure of his person. For if it does, the trial court must be affirmed since the United States Supreme Court has held that the agent had no articulable or reasonable suspicion sufficient to justify a seizure. Reid v. Georgia, supra.

We find that during this initial encounter there was no seizure. "[A] person is 'seized' only when by means of physical force or a show of authority, his freedom of movement is restrained." U. S. v. Mendenhall, supra, 446 U. S. at 553 (opinion by Justice Stewart, joined by Justice Rehnquist). Justice Stewart concluded that "a person has been 'seized' within the meaning of the Fourth Amendment only if, in view of all of the circumstances surrounding the incident, a reasonable person would have believed that he was not free to leave.[4] Examples of circumstances that might indicate a seizure, even where the person did not attempt to leave, would be the threatening presence of several officers, the display of a weapon by an officer, some physical touching of the person of the citizen, or the use of language or tone of voice indicating that compliance with the officer's request might be compelled." Id. at 554.

---

[4] (Footnote added.) This statement was quoted by Justice Powell in his concurring opinion, joined by the Chief Justice and Justice Blackmun, in Reid v. Georgia, supra, in which he stated that the seizure issue remains open for consideration by the state courts. Justice White in his dissenting opinion, joined by Justices Brennan, Marshall and Stevens, in United States v. Mendenhall, supra, was also of the view that the seizure issue was not properly before the Court.

Considering these factors here, there were two citizens and only one DEA agent, they were standing just outside an airline terminal, the agent's weapon was not visible to the defendant or his companion, and the agent "suggested these men go back into the airport" (finding by the trial court, quoted above) and requested their consent to a search. Assuming the agent did tap the defendant on the shoulder at the outset to get his attention (see fn. 1, supra), he simultaneously said excuse me or something similar; in view of all the circumstances this physical contact alone does not constitute a seizure such that a reasonable person would believe he was not free to leave.[5] On this evidence, we find (paraphrasing U. S. v. Mendenhall, 446 U. S. at 555, nothing in the record to suggest that the defendant had any objective reason to believe that he was not free to end the conversation and proceed on his way and for that reason we conclude that the agent's initial approach to him was not a seizure.[6] It was error to find that the defendant was under arrest at the time the agent suggested he go back into the terminal. We therefore reverse the affirmance of the order granting the motion to suppress which order was based on the conclusion that Reid had been arrested before he fled.

Judgment reversed and remanded for further proceedings not inconsistent with this opinion. All the Justices concur, except Smith, J. disqualified.

---

[5] See United States v. Robinson, 625 F2d 1211, 1216 (5th Cir. 1980), where the discrepancy between the agent's testimony and that of the defendant that the agent touched the defendant on the arm was not considered material. In the case before us the agent indicated verbally that he was suspicious about the defendant but the request that they consent to be searched showed that he had such suspicious in any event.

[6] See United States v. Berry, 636 F2d 1075, 1079 (5th Cir. 1981).

APPENDIX D

PERTINENT PORTIONS OF THE UNITED STATES CONSTITUTION

The pertinent portions of the United States Constitution are as follows:

THE RIGHT OF THE PEOPLE TO BE SECURE IN THEIR PERSONS, HOUSES, PAPERS AND EFFECTS, AGAINST UNREASONABLE SEARCHES AND SEIZURES SHALL NOT BE VIOLATED AND NO WARRANTS SHALL ISSUE BUT UPON PROBABLE CAUSE, SUPPORTED BY OATH OR AFFIRMATION, AND PARTICULARLY DESCRIBING THE PLACE TO BE SEARCHED AND THE PERSON AND THINGS TO BE SEIZED.

Office-Supreme Court, U.S.
FILED
AUG 13 1981
ALEXANDER L. STEVAS,
CLERK

No. 81-180

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

TOMMY REID, JR.,
Petitioner,

v.

STATE OF GEORGIA,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS OF GEORGIA

BRIEF IN OPPOSITION FOR THE RESPONDENT

JOHN C. WALDEN
Senior Assistant
Attorney General
Counsel of Record for Respondent

MICHAEL J. BOWERS
Attorney General

ROBERT S. STUBBS, II
Executive Assistant
Attorney General

DON A. LANGHAM
First Assistant
Attorney General

MARY BETH WESTMORELAND
Assistant Attorney General

132 State Judicial Bldg.
40 Capitol Square, S.W.
Atlanta, Georgia 30334
(404) 656-3339

QUESTION PRESENTED

Whether the decision by the Court of Appeals of Georgia reversing the trial court's denial of a motion to suppress did not contradict the prior ruling of this Court in Reid v. Georgia, 448 U.S. 438 (1980).

TABLE OF CONTENTS

	Page
QUESTION PRESENTED	I
STATEMENT OF THE CASE	1
REASONS FOR NOT GRANTING THE WRIT	
I. THE DECISIONS BY THE GEORGIA APPELLATE COURTS WERE CORRECT AND DID NOT CONTRADICT THE DECISION OF THIS COURT IN REID V. GEORGIA	5
CONCLUSION	10
CERTIFICATE OF SERVICE	11

TABLE OF AUTHORITIES

CASES	PAGE
Reid v. Georgia, 448 U.S. 438 (1980).	passim
State v. Reid, 149 Ga. App. 685, 255 S.E.2d 71 (1979).	2, 6
State v. Reid, 156 Ga. App. 78, 274 S.E.2d 164 (1980)	3
State v. Reid, 247 Ga. 445, ___ S.E.2d ___ (1981)	4, 8
State v. Reid, ___ Ga. App. ___, ___ S.E.2d ___, Case No. 57466, decided May 19, 1981.	4
Terry v. Ohio, 392 U.S. 1 (1968).	6
United States v. Mendenhall, 446 U.S. 544 (1980)	7

No. 81-180

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1980

TOMMY REID, JR.,

Petitioner,

v.

STATE OF GEORGIA,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE COURT OF APPEALS OF GEORGIA

BRIEF IN OPPOSITION FOR THE RESPONDENT

PART ONE

STATEMENT OF THE CASE

Petitioner, Tommy Reid, Jr., was indicted by the Superior Court of Fulton County, Georgia, on a charge of violation

of the Georgia Controlled Substances Act. After a hearing, the trial court granted the Petitioner's motion to suppress the drugs which serve as the basis of the charge. The State of Georgia appealed the granting of the motion to suppress to the Court of Appeals of Georgia.

On the initial appeal, the Georgia Court of Appeals found that any seizure was permissible based on the drug profile used by the United States Drug Enforcement Administration. Thus, the court reversed the decision of the trial court. State v. Reid, 149 Ga. App. 685, 255 S.E.2d 71 (1979). A rehearing was denied by that court on April 24, 1979. The Supreme Court of Georgia denied certiorari on June 20, 1979.

The Petitioner filed an application for a writ of certiorari in this Court

for review of the decision by the Court of Appeals of Georgia in Case No. 79-448. This Court granted certiorari and determined that the agent could not have been reasonably suspicious of the Petitioner's criminal activity on the basis of the circumstances he had observed. Thus, this Court ruled that the judgment of the Court of Appeals of Georgia could not be sustained "insofar as it rests on the determination that the DEA agent lawfully seized the Petitioner when he approached him outside the airline terminal." Reid v. Georgia, 448 U.S. 438 (1980).

On remand from this Court, the Court of Appeals affirmed the trial court's order which sustained the motion to suppress. State v. Reid, 156 Ga. App. 78, 274 S.E.2d 164 (1980). No comment was made in that decision as to whether it was

actually a seizure of the Petitioner by the authorities.

The State filed a petition for a writ of certiorari in the Georgia Supreme Court. That court granted the petition and reversed the decision of the Georgia Court of Appeals finding that Petitioner had not been arrested before he fled from the presence of the agent. State v. Reid, 247 Ga. 445, ___ S.E.2d ___ (1981). The Court of Appeals of Georgia then adopted a decision of the Supreme Court of Georgia and reversed the trial court's judgment. State v. Reid, ___ Ga. App. ___, ___ S.E. 2d ___, Case No. 57466, decided May 19, 1981.

Petitioner has filed the instant petition for a writ of certiorari alleging that the decision by the Supreme Court of Georgia and the subsequent decision of

the Court of Appeals of Georgia were improper as they did not follow the law of the case set forth by this Court.

PART TWO

REASONS FOR NOT GRANTING THE WRIT

I. THE DECISIONS BY THE GEORGIA APPELLATE COURTS WERE CORRECT AND DID NOT CONTRADICT THE DECISION OF THIS COURT IN REID V. GEORGIA.

Petitioner's only argument at this point is that the decision rendered by this Court in Reid v. Georgia, supra, set forth the law of the case in regard to the question of a seizure. Petitioner asserts that the decision by the Georgia appellate courts following this Court's decision conflicted with the decision of this Court. Respondent asserts that the Supreme Court of Georgia and the Court of

Appeals properly considered an issue not presented to this Court on the first petition for a writ of certiorari and found that there was no arrest involved in the instant case.

The basis for the original decision by the Georgia Court of Appeals was that any stop of the Petitioner was proper based on the use of a profile by the agent and found that it was sufficient evidence to show an articulable suspicion sufficient to justify such a stop under Terry v. Ohio, 392 U.S. 1 (1968). State v. Reid, supra, 149 Ga. App. at 687. The decision by this Court in Reid v. Georgia, supra, found that the evidence did not show a basis for any reasonable suspicion that would be sufficient to justify a seizure of the Petitioner. This Court specifically noted that the judgment of the Court of Appeals could not be upheld

insofar as it found that the agent lawfully seized the Petitioner. Reid v. Georgia, supra.

In analyzing the question on review after this Court's decision, the Supreme Court of Georgia noted the concurring opinion of this Court in Reid v. Georgia. In that opinion, Justice Powell, joined by Chief Justice Burger and Justice Blackmun noted that this case was remarkably similar to the facts in United States v. Mendenhall, 446 U.S. 544 (1980). The Justices noted that the question of whether the petitioner had actually been seized when he was stopped was open for consideration. See Reid v. Georgia, supra. Thus, the Supreme Court of Georgia was within its authority to make a determination not made by this Court and find that there had never been an arrest of the Petitioner.

Clearly, as determined by the Supreme Court of Georgia, there was no actual seizure of the Petitioner during the initial encounter with the agent. State v. Reid, supra, 247 Ga. at 450. Therefore, the appellate courts properly reversed the decision of the trial court based on a finding that there had not been an arrest or seizure of the Petitioner.

Respondent submits that the appellate courts properly determined an issue not considered by this Court on its earlier review and therefore did not render any decisions in conflict with the earlier decision of this Court. Even though the decision of this Court is the law of the case as to the issue considered by the Court, the lower courts would be free to consider issues not presented to nor decided by this Court. Therefore,

no federal constitutional question is presented for review by this Court.

CONCLUSION

For the above and foregoing reasons, Respondent respectfully requests this Court deny the petition for a writ of certiorari filed on behalf of the Petitioner, Tommy Reid, Jr.

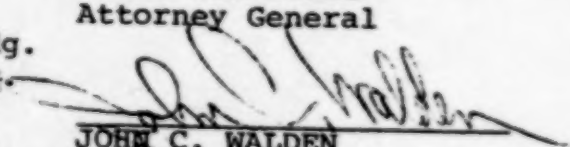
Respectfully submitted,

MICHAEL J. BOWERS
Attorney General

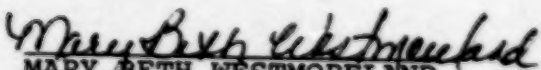
ROBERT S. STUBBS, II
Executive Assistant
Attorney General

DON A. LANGHAM
First Assistant
Attorney General

132 State
Judicial Bldg.
40 Capitol Sq.
Atlanta, Ga.
30334



JOHN C. WALDEN
Senior Assistant
Attorney General
Counsel of Record for
the Respondent



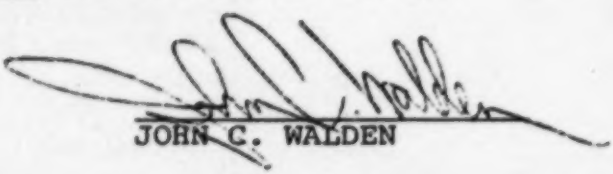
MARY BETH WESTMORELAND
Assistant Attorney
General

CERTIFICATE OF SERVICE

I, John C. Walden, a Member of the Bar of the Supreme Court of the United States and Counsel of Record for the Respondent, hereby certify that in accordance with the Rules of the Supreme Court of the United States, I have this day served a true and correct copy of this Brief in Opposition for the Respondent upon the Petitioner by depositing three copies of same in the United States mail with proper address and adequate postage to:

Mr. Dennis S. Mackin
Strother, Weiner & Dwyer
1401 West Paces Ferry Rd.
Atlanta, Georgia 30327

This 11th day of August, 1981.



JOHN C. WALDEN